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Supreme Court of the United States

October Term, 1933

No. 133

R. H. STEARNS COMPANY, Boston, Massachusetts,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

BRIEF FOR PETITIONER

I.

OPINION OF THE COURT BELOW

The opinion of the Court of Claims is reported in 2 Fed. Supp. 773.

II.

JURISDICTION

The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, (44 Stat. 936).

The final judgment of the Court of Claims was entered on March 13, 1933, and the Petition for a Writ of Certiorari was filed by the petitioner on June 7th, 1933.

III.

THE QUESTIONS INVOLVED

This suit was brought in the Court of Claims for the refund of $14,928.07 income and profits taxes admittedly overpaid for the year 1918. Instead of being refunded to the petitioner this overpayment was credited to an additional tax for 1917 which, according to the view of the petitioner, was barred at the time the credit was made. In order to sustain the validity of the credit, which was made more than five years after the 1917 return was filed, the Government relies upon a certain "waiver" signed by the petitioner on February 19, 1923. The petitioner challenges the effectiveness of this waiver, and it is that point which presents the first issue in this case.

A second point, but in the eyes of the petitioner an equally important one, concerns the propriety of a remark included in the opinion of the Court of Claims and directed at the character and conduct of the petitioner and/or its attorneys.

IV.

THE FACTS

1. The petitioner herein is a Massachusetts corporation with its principal place of business in Boston, Massachusetts. (R. 4)

2. On or after June 28, 1924, the Commissioner of Internal Revenue transmitted to the petitioner a certificate of overassessment for the fiscal year ended July 31, 1918, showing an overpayment of $14,928.07. (R. 9) This overpayment was not refunded, but instead was credited to an additional tax for the fiscal year ended July 31, 1917, (R. 7) which additional tax was assessed on June 26, 1923. (R. 6) The credit was made on June 28, 1924, (R. 7) which

was more than five years after the filing of petitioner's 1917 return. (R. 4)

The collection on June 28, 1924, was more than one year after the date of the assessment (June 26, 1923).

On August 9, 1923, (a date ten months prior to the date of collection above cited) the petitioner filed a claim for refund and credit for the fiscal years 1918, 1919, 1920 and 1921, which were years subsequent to the year 1917 against which the then outstanding assessment of June 26, 1923, had been made. (R. 6)

> "It was the practice in the collector's office at the time this claim for refund and credit was filed, to treat such claims as a stay of collection of the unpaid taxes against which the credit was sought to be applied, until the commissioner had considered and adjusted the claim." (R. 6)

3. The petitioner filed its income tax return for the fiscal year ended July 31, 1917, on April 10, 1918, and paid the tax shown thereon to be due. (R. 4)

4. On February 19, 1921, the petitioner filed with the Commissioner of Internal Revenue a waiver for 1917 which was unlimited in scope, giving the Commissioner of Internal Revenue the right to determine, assess and collect any tax for 1917 irrespective of the statute of limitations. (R. 5)

5. On February 19, 1923, that is to say, two years later, the petitioner filed with the Commissioner of Internal Revenue an uncompleted waiver form for the year 1917, executed by the petitioner, but with the space for the signature of the Commissioner left blank. (R. 5-6) This waiver by its terms required assessments to be made before March 1, 1925. (R. 5) It opened with the words, "In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, R. H. Stearns & Company, of Boston,

Massachusetts, and the Commissioner of Internal Revenue, hereby consent * * *" (R. 5).

6. On April 11, 1923, the Commissioner of Internal Revenue then in office, issued a proclamation or statement commonly known as 'Commissioner's Mimeograph 3085', which declared that unlimited waivers for 1917 would be held to expire on April 1, 1924. (R. 5)

7. On June 26, 1923, and within the statutory period as extended by the first waiver (the waiver of February 19, 1921) the Commissioner of Internal Revenue, disregarding the second waiver which he had not signed, assessed an additional tax against the petitioner for the fiscal year 1917 in the sum of $22,189.10. (R. 6) On the assessment list was the notation, "7/31/17 Fisc 1753361 O L 4/17/23 Waiver." No proof was offered as to what particular document the word "waiver" had reference. (R. 6)

8. A portion of this additional assessment, to-wit, $14,928.07, was collected on June 28, 1924. (R. 7) The collection was effected by the credit of the 1918 taxes overpaid. (R. 7)

9. On February 21, 1927, this Honorable Court handed down the decision of *Bowers* v. *New York & Albany Lighterage Company*, 273 U. S. 346.

10. On April 7, 1930, the then Commissioner of Internal Revenue, Robert H. Lucas, who had entered office on June 1, 1929, purported to accept and proceeded to sign the waiver of February 19, 1923. (R. 6) This date of 'acceptance' and signing was more than seven years after the execution of the waiver by the taxpayer (Feby. 19, 1923, R. 6) and almost six years after the tax collection which was thereby sought to be validated. (June 28, 1924, R. 7)

11. On May 20, 1930, the petitioner filed a petition in the Court of Claims demanding the refund to it of the 1918 overassessment of $14,928.07 described in Paragraph 2 above. (R. 1-3)

12. Said petition was dismissed by an order of the Court of Claims dated March 13, 1933. (R. 13)

The opinion handed down by the Court of Claims at the time the order dismissing the petition was issued contained the following statements:

> "In the instant case both parties had a clear understanding that the statutory period had been extended and both acted upon that understanding. For years the plaintiff was satisfied and contented with the understanding. *But by some mysterious channel,* after six years, the plaintiff learns the commissioner has placed his signature to the waiver and then for the first time he complains about what was the understanding. No complaint was made while his signature was lacking." (Italics ours.) (R. 12)

13. On April 6, 1933, the petitioner filed a Motion for Rehearing. (R. 13) Said Motion requested the Court of Claims to expunge from the record the statement appearing in the court's opinion that the petitioner had learned of the late signing of the waiver through some mysterious channel. Said Motion set out explicitly, the source from which the petitioner had derived such information and the method by which it had been secured. Said Motion stated further that the language of the court raised an inference of improper conduct on the part of the petitioner and/or its attorneys and tended to bring them into disrepute.

14. The Motion of the petitioner in this connection was denied by the Court of Claims on May 8, 1933. (R. 13)

V.

THE STATUTES

The statutes involved in this case are Section 250 (d) of the Revenue Act of 1921; Section 278 (e) of the Revenue Act of 1924; Section 1106 (a) of the Revenue Act of 1926;

and Sections 506, 607 and 609 (a) of the Revenue Act of 1928.

VI.

SPECIFICATIONS OF ERROR

The errors in the decision of the Court of Claims of which the petitioner complains, are:

1. The court below erred in holding that a waiver executed by the taxpayer on February 19, 1923, for six years entirely disregarded by the Commissioner of Internal Revenue and not accepted by him until April 7, 1930, and then accepted and signed by a new Commissioner who entered office only on June 1, 1929, was good to validate the collection at June 28, 1924, of a 1917 tax assessed on June 26, 1923.

2. The decision of the court is contrary to the evidence and not supported by the finding of fact.

3. The Court of Claims erred in stating that a benefit flowed to the petitioner by reason of the second waiver, and erred in attributing conduct akin to "laches" to the petitioner, for his suit was timely brought.

4. The court below included in its opinion remarks which had no basis either in fact or in the record and which were calculated to bring the reputation of the petitioner and/or its attorneys into disrepute.

VII.

SUMMARY OF ARGUMENT

1. The Overpayment for the year 1918 was not refunded, but was illegally credited to a barred tax for the year 1917, and is now recoverable under Section 609 of the Revenue Act of 1928.

(a) There was no consent in writing between the Commissioner of Internal Revenue and the taxpayer extending the statute for 1917 far enough to cover the date of the collection.

(b) The Commissioner of Internal Revenue did not enter into the alleged consent, and did not mean to do so.

(c) The Commissioner of Internal Revenue did not rely on any agreement consenting to an extension of the statute far enough to cover the collection in question, and there was no such agreement.

(d) The notation "waiver" on the Assessment Roll cannot be said to refer to the waiver in dispute.

(e) The signing of the waiver form nearly six years too late by a new and different Commissioner of Internal Revenue and just prior to the filing of suit by the petitioner, cannot create a consent going back nearly six years so as to defeat the right of action.

(1) Even if this instrument became a consent, which is denied, it was entered into too late and the statute declares it void.

(2) The waiver under dispute amounts to an unsigned waiver, assuming that the unsigned waiver was purposely unsigned.

2. The decision of the Court of Claims is contrary to the evidence and not supported by the finding of facts.

3. The Court of Claims erred in stating that a benefit flowed to the petitioner by reason of the second waiver, and erred in attributing conduct akin to "laches" to the petitioner, for his suit was timely brought.

4. This is a suit upon an account stated for 1918.

5. In deciding this case the Court of Claims apparently fell into the error of assuming that the petitioner acquired its information from an improper source. Accordingly in its opinion it included language which gave expression to

this opinion and which was calculated to and did bring the reputation of the petitioner and its attorneys into disrepute. The Court further failed to alter such language in the face of an explanation made by the petitioner which showed conclusively that the sources from which it derived its information were entirely regular and proper.

VIII.

ARGUMENT

1. The Overpayment for the year 1918 was not refunded, but was illegally credited to a barred tax for the year 1917, and is now recoverable under Section 609 of the Revenue Act of 1928.

(a) There was no consent in writing between the Commissioner of Internal Revenue and the taxpayer extending the statute for 1917 far enough to cover the date of the collection.

(b) The Commissioner of Internal Revenue did not enter into the alleged consent, and did not mean to do so.

(c) The Commissioner of Internal Revenue did not rely on any agreement consenting to an extension of the statute far enough to cover the collection in question, and there was no such agreement.

The 1917 tax in question was collected by means of a credit of an agreed 1918 overpayment (R. 7) on June 28, 1924, which date was more than five years after the 1917 return of the petitioner was filed. (R. 4) In this case the Commissioner of Internal Revenue had on file a good waiver of the statute of limitations for 1917 dated February 19, 1921, properly signed, and unlimited in scope. (R. 5)

He had, as a result, until Doomsday to assess and collect the tax in question. It is quite apparent that no new

consent was needed, nor desired, and that a new consent would add nothing to the rights or to the time that the Commissioner of Internal Revenue then had. Accordingly when an unsolicited (R. 7) new consent was tendered to the Commissioner of Internal Revenue on February 19, 1923, and that proposed consent by its terms cut down the Commissioner's time to assess the tax in question from 'forever' to two years from March 1, 1923, (R. 5) he refused to sign it, and did not enter into the proposed consent, for it would have *served only to cut short his time* and not to enlarge it.

Thereafter, and on April 11, 1923, the Commissioner of Internal Revenue by his own act, through a published proclamation, known as 'Commissioner's Mimeograph 3085,' established a time limit on unlimited waivers for 1917, proclaiming that all such waivers should expire on April 1, 1924. (R. 5)

And accordingly, before April 1, 1924, well within the time he himself had set, indeed on June 26, 1923, when he had yet nine months left, the Commissioner of Internal Revenue assessed the tax in question (R. 6) under the old waiver, the one that he had accepted. (R. 9)

From the above it is quite clear that the Commissioner of Internal Revenue relied on the executed waiver of February 19, 1921, and that the waiver of February 19, 1923 never received the approval of the Commissioner, and the Court of Claims erred in drawing other and different conclusions from these facts.

As was said in the case of *Commissioner of Internal Revenue* vs. *United States Refractories Corporation*, 64 F. (2d) 69, decided by the United States Circuit Court of Appeals for the Third Circuit, affirmed by this Honorable Court on October 23, 1933:

> "The Commissioner's failure to sign indicates his failure to agree to an extension. * * * as the statu-

> tory limitation for the collection of taxes is clearly made for the benefit of taxpayers, the Congress may have thought that a taxpayer, when asked to give a waiver for the convenience of the Commissioner and thereby surrender the benefit the statute accords him, *is in a position to impose terms which, before the waiver becomes effective or legal must be acceptable to and agreed upon by the Commissioner.* Otherwise a waiver prepared and signed by the taxpayer alone may waive nothing, in which case, if the waiver be valid on the unilateral signing and on a mere filing, the government might, by the Commissioner's delay, or by his ignorance of its terms, or of its extension, lose the tax. * * *" (Italics ours.)

It will be noted in the case at bar that the waiver in question, namely the waiver of February 19, 1923, cut short the time the Commissioner already had from 'forever' to two years from March 1, 1923. Thus it will be seen that the waiver which the Commissioner refused to sign and accept was just such a waiver as was referred to in the case of *United States Refractories Corporation* (supra) attempting to impose restrictions and limitations on the Commissioner of Internal Revenue which the Commissioner of Internal Revenue was unwilling to accept.

It will be noted in the case at bar that not only was the assessment made under the good waiver of February 19, 1921, but also that the Collector had at that time yet nine months and seven days in which he could legally collect. (June 26, 1923, the date of assessment to April 1, 1924, the end of the statutory period as extended by the valid consent of February 19, 1921, as limited by Commissioner's Mimeograph 3085).

But the Collector failed to collect by or before April 1, 1924, and as a consequence the tax became barred.

(d) The Notation 'Waiver' on the Assessment Roll Cannot Be Said to Refer to the Waiver in Dispute.

It has been urged by the Government, and was one of the

conclusions of the Court of Claims, that the notation on the Assessment Roll—"waiver"—referred to this unexecuted waiver or consent and that, coupled together, the unexecuted consent and the Assessment Roll spell out a good waiver or consent. But in the light of the fact that when the notation was made, at the time of the assessment, (June 26, 1923—R. 6) there was in fact another, different and valid waiver or consent (waiver of February 19, 1921, R. 5), and in the absence of any proof, it seems clear to the petitioner that the waiver referred to on the Assessment Roll was the good waiver, and not the unsigned and unaccepted bad one. Moreover, the Government with all the facts in its possession failed to offer any proof tending to show the waiver referred to was the unsigned second waiver.

It is far more reasonable to conclude that the waiver referred to on the Assessment Roll was the good, binding and subsisting waiver than that it was the rejected offer to make another waiver. The Court of Claims really reached this conclusion in its opinion (bottom of Page R. 9).

(e) The signing of the waiver form nearly six years too late by a new and different Commissioner of Internal Revenue and just prior to the filing of suit by the petitioner cannot create a consent going back seven years so as to defeat the right of action.

It will be noted that when this suit threatened, and only then, a new Commissioner of Internal Revenue, (R. 6) attempted almost six years after the transaction in question was completed (R. 6) to validate the waiver; and it is suggested that he did this only in order to defeat the right of action in this suit, then threatened.

The petitioner believes that the rights of litigants are not to be defeated by any such subterfuge, which amounts

merely to an attempt to make it appear that there was a consent when it is so evident that there was none.

The petitioner believes the question of the validity of such tardy consents is now disposed of by statute and by decisions of this Honorable Court, but even before the enactment of the statute, and the decision of this Court, the matter was considered and resolved in favor of the petitioner's view:

In *Greylock Mills* vs. *Commissioner*, 31 Fed. (2nd) 655, it was said by the Second Circuit:

> "• • • The statute says nothing as to when the Commissioner shall sign, nor as to giving notice when he does so. *If he signs before the taxpayer withdraws his waiver, and before the statutory period for assessment has run,* the waiver is executed as the statute requires. Nothing more is needed to give the waiver validity." (Italics ours.)

(e)(1) Even if This Instrument Became a 'Consent', Which Is Denied, It Was Entered Into Too Late and the Statute Declares It Void.

Moreover, the petitioner believes, and urges, that the Revenue Acts expressly prohibit such tardy 'consents'.

The question of the right to revive taxes barred by the statutory period of limitations by a consent entered into after the passage of Section 1106 of the Revenue Act of 1926 (when the taxes were barred on the date of the passage of the 1926 Act) was passed on by this Honorable Court, on October 23, 1933, in the cases of *Commissioner* vs. *Northern Coal Company*, and *Commissioner* vs. *C. H. Sprague & Sons Compnay*. Nos. 18 and 19. In those cases it was held by the courts below, and affirmed by this Court, that the right could not be revived. Petitioner submits that at the passage of the 1926 Act the taxes in question had been and were barred, and, though collected, had been collected when barred, and that a 'consent' executed in

1930, even if genuine, could not revive them, nor defeat the claim for refund.

(e)(2) The 'Waiver' Under Dispute Amounts to an Unsigned Waiver, Assuming That the Unsigned Waiver was Purposely Unsigned.

The petitioner believes that his case is a better case than that of the ordinary *unsigned* waiver, because there might be cases wherein the Commissioner of Internal Revenue failed to sign a waiver, although he acknowledged it and relied upon it; a question not involved here. In the case at bar there was a signed waiver that the Commissioner acknowledged and relied upon (R. 5), and in addition there was an unsigned one that he had refused and failed to sign. A new Commissioner later signed it, almost on the eve of trial, and almost six years too late. (R. 6)

The petitioner, however, begs leave to point out that if the Commissioner of Internal Revenue can add his signature at any time with retroactive effect no case of an unsigned waiver need ever come to trial, for he could add his signature at the moment the instrument is introduced into evidence.

The question of the validity of an unsigned waiver has recently been passed upon by this Honorable Court in *Commissioner* vs. *United States Refractories Corporation*, No. 20, decided Oct. 23, 1933, wherein it was held in the court below, and affirmed in this Court, that an unsigned waiver is of no effect.

It is submitted that the tax against which the agreed 1918 overpayment was credited was barred and that, as a result, the credit was void, and the 1918 overpayment should be refunded.

2. The Decision of the Court is Contrary to the Evidence and Not Supported by the Findings of Fact.

The cause of the delay of the Collector, described in the

paragraphs above, whereby the timely assessment was collected too late, becomes a vital consideration in view of the Court of Claims' opinion that the delay was caused by reliance on the second waiver—the unsigned waiver of February 19, 1923, the one in dispute here.

The court, however, found as a fact that in August, 1923, (a time when the statute had yet nine months' life under the old waiver, the one of February 19, 1921) certain claims were filed for *other years* (R. 6). The court then found as a fact that the practice was to treat such *claims* as a stay of collection and to delay thereon (R. 6).

The only possible inference or conclusion that could be drawn from the above facts is that the Collector delayed because of the *claims*.

It follows as a necessary conclusion that if he delayed on account of the claims he could not have delayed on account of the waiver.

There was not one scintilla of evidence, and no fact was found, to support the italicized part of the court's opinion reading as follows:—

> " • • • As a result of the filing of the claim, a consideration of which necessitated an examination of plaintiff's returns for four years beginning in 1917 and ending in 1921, *and thus might well have required, and did require, more time than remained until the first waiver expired, it is certainly reasonable to say that in such consideration the commissioner relied upon the second waiver which was then on file.*" (Italics ours.) (R. 9-10.)

If speculation as to the cause of the delay is to be indulged in, and the findings ignored, and the absence of proof excused, then the petitioner submits that it is a well known fact that up to the time that this Honorable Court decided the case of *Bowers* v. *New York & Albany Lighter-*

age Company, 273 U. S. 346, (decided February 1, 1927) the Commissioner of Internal Revenue mistakenly believed that if he assessed on time he could collect at leisure.

Indeed, the Commissioner of Internal Revenue in 1922 issued a ruling known as IT 1446 to that effect, and had it published in his official Internal Revenue Bulletin known as 'Cumulative Bulletin I-2, July-December, 1922' on Page 218. It read in part as follows:

> "This office is of the opinion that the following provision of section 250 (d) of the Revenue Act of 1921:
>
> 'No suit or proceeding for the collection of any such taxes due under this Act or any prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun after the expiration of five years after the date when such return was filed—'
>
> refers only to judicial proceedings for the collection of such taxes and not to the summary proceeding by means of distraint authorized by sections 3187 to 3209 of the Revised Statutes of the United States.
>
> "As the additional taxes in question were placed on the assessment list under date of February 24, 1922, it will be seen that such taxes were determined and assessed within the five-year period of limitation provided in section 250 (d) of the Revenue Act of 1921, *and that the action of the collector in demanding payment after the expiration of such five years was entirely proper.* If payment of the additional assessment of taxes was not made within the prescribed time, *the collector may proceed by means of distraint to collect such taxes.*" (Italics ours.)

The petitioner submits that the delay was due to reliance on the claims as found in the facts in an erroneous understanding of the principles of law regarding their effect, and was not due to any reliance on an unsigned waiver which the Commissioner of Internal Revenue had failed to accept.

3. The Court of Claims Erred in Stating that a Benefit Flowed to the Petitioner by Reason of the Second Waiver, and Erred in Attributing Conduct Akin to Laches to the Petitioner, for His Suit was Timely Brought.

That part of the opinion of the Court of Claims dealing with alleged benefits obtained by the petitioner as a result of the disputed "waiver", is not supported by evidence or the facts of record, for nothing was done by the respondent in reliance on the "waiver"; and no benefits were granted the petitioner in reliance thereon.

That part of the opinion of the Court of Claims dealing with the question of the time of filing this action is of no avail, because it is submitted that laches is not a defense in a lawsuit for taxes; and that all parties have agreed, and it has been shown, that the action was brought within six years of the allowance of the overpayment and six years of the receipt of the Certificate of Overassessment.

4. This is a Suit Upon an 'Account Stated' for 1918.

The government argues in its brief in opposition to the Petition for Writ of Certiorari that the certificate of overassessment on which the petitioner relies does not amount to an account stated. The certificate of overassessment in the case at bar is identical in every essential particular with that in the case of *Bonwit-Teller Co.* v. *United States,* 283 U. S. 258, and the petitioner respectfully submits that this point, if urged by the Government, falls on authority of that case.

The petitioner accepted as correct the statement of account by the Commissionar for the year 1918 showing his allowance of an overpayment of $14,928.07 for that year, which is the subject of this suit, but insisted, as did the taxpayer in the case of *Bonwit-Teller Co.* supra, that the 1918 overpayment should be refunded instead of credited, inas-

much as the tax for 1917, against which the credit had been made, was barred by the statute of limitations.

Section 609 of the Revenue Act of 1928 expressly declared such credits void and provides for the repayment of money so credited.

At the time of the Commissioner's allowance of the overpayment for 1918, and at all times since, the plaintiff has accepted the correctness of the statement of overpayment for 1918.

The certificate of overassessment, which was mailed to the petitioner following the approval on June 28, 1924, of the schedule allowing the overpayment, states the account for the particular taxable year by showing the total amount of the overpayment allowed. Each taxable year stands alone, *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359, and the allowance of an overpayment and the delivery of a certificate of overassessment for a particular taxable year is a statement of the account for such year, and if there is no tax legally due the Government for another taxable year, the statute raises an implied promise to pay the overpayment allowed by the Commissioner and stated in the certificate of overassessment.

5. In Deciding this Case the Court of Claims Apparently Fell into the Error of Assuming that the Petitioner Acquired its Information from an Improper Source. Accordingly in its Opinion it Included Language which Gave Expression to this Opinion and which was Calculated to and Did Bring the Reputation of the Petitioner and Its Attorneys into Disrepute. The Court further Failed to Alter Such Language in the Face of an Explanation Made by the Petitioner which Showed Conclusively that the Sources from which it Derived its Information were Entirely Regular and Proper.

The case at bar presents an angle that seldom occurs in the course of litigation tried by our courts. The Court of Claims in rendering its opinion made reference to the origin of petitioner's information relative to the signing of the waiver of February 19, 1923, by Commissioner Lucas on April 8, 1930, as secured "through some mysterious channel." The implication of this remark is clear. It amounted to the enunciation of a suspicion that the petitioner and/or its attorney had secured certain information from an improper source.

The petitioner cherishes its good name among its associates in business, and before the world. The attorneys for the petitioner value beyond price their standing at the bar and their reputation in the communities in which they live. It is particularly true of the practice of income tax law that an unsullied reputation is a matter of vital concern.

The report and the suspicion exist in almost every corner of the United States that some persons employed in the Bureau of Internal Revenue divulge to attorneys in the practice of income tax law information which it is improper to give out. The motive which is reported to actuate such conduct is either favoritism or other incentives of a more material sort.

The language used by the Court of Claims in this case could reasonably be expected to convey to the public the idea that the petitioner was the beneficiary of such improperly secured information. As a result of such language a serious injury was done to the reputation of the petitioner and its attorneys. This is evidenced by the fact that at the very next trial at which the attorneys for the petitioner appeared they were chided in a public place by Government employees for the rebuke administered to them by the Court of Claims. In many other situations the attorneys for the petitioner are constantly being made

aware of the injury done to them by this remark of the Court of Claims.

Immediately upon the publication of the opinion in this case by the Court of Claims, the petitioner filed a motion with said court respectfully praying for a correction of the record. The motion was denominated a "Motion for Leave to Show the Court How Plaintiff Came into Possession of Certain Information and for Correction of the Record." A copy of said motion is attached hereto, made a part hereof, and marked "Exhibit A."

In this motion the petitioner set out explicitly how the information at issue was secured and emphasized the injury done to it and its attorneys by the unfortunate remarks of the court. This action on the part of petitioner was not in any way challenged by the Government. The Attorney General's Office, representing the Government, interposed no opposition whatever. Yet the Court of Claims adhered to the wording of its original opinion and denied the motion. This Honorable Court has been less unyielding in cases where error has crept into opinions rendered by it. *Weedin* v. *Chin Bow*, 274 U. S. 657; *U. S.* v. *Dublier Condenser Co.*, 289 U. S. 178, and 706.

The petitioner in the case at bar is suing on an account stated. It has no choice of courts in which to sue. Its action must be brought in the Court of Claims. The petitioner feels that it is entitled to bring an action in such court without subjecting itself to the humiliation of unjust reflections upon its conduct.

The attorneys for the petitioner feel that as members of the bar, so long as they conduct themselves properly, they should not only yield but receive respect from the courts before whose bars they appear to plead. The Court of Claims has done a serious injury to them. The injury was uncalled for by any act committed by counsel. Accordingly the petitioner and its attorneys pray this Honorable

Court for such relief as may to it seem meet and just under the circumstances.

That this court can, if it so desires, act in the premises is beyond question. It has only recently seen fit to admonish courts of high jurisdiction as to the propriety of certain lines of conduct. *Quercia* v. *U. S.*, 289 U. S. 466; *Johnson* v. *Manhattan Ry. Co. et al*, 289 U. S. 479.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers and that the decision of the Court of Claims should be reversed and such other and further relief accorded to the petitioner as seems to this Honorable Court appropriate under the circumstances.

Respectfully submitted,

FREDERICK S. WINSTON,
Attorney for Petitioner,
920 Potomac Electric
Power Co. Building,
Washington, D. C.

HOWE P. COCHRAN,
WILLIAM N. WOOD,
Of Counsel.

APPENDIX

EXHIBIT A

IN THE

Court of Claims of the United States

R. H. STEARNS COMPANY,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

No. L—187

MOTION FOR LEAVE TO SHOW THE COURT HOW PLAINTIFF CAME INTO POSSESSION OF CERTAIN INFORMATION AND FOR CORRECTION OF THE RECORD.

To the Honorable, the Chief Justice, and the Judges of the Court of Claims:

Comes now the Plaintiff, through its attorneys, HOWE P. COCHRAN, WILLIAM N. WOOD and FREDERICK S. WINSTON, and begs leave of the Court to show how certain information came into its possession and prays the Court to correct the record by eliminating from Page six of its decision, the following words: "by some mysterious channel" contained in the following sentence:

"But by some mysterious channel, after six years, the plaintiff learns that the Commissioner has placed his signature to the waiver and then for the first time he complains about what was the undersanding."

The facts concerning the channel whereby the Plaintiff came into possession of this information are:

That on February 19, 1923, the Plaintiff herein filed with the Commissioner of Internal Revenue a form of waiver. At that time the Commissioner had not accepted and signed it for it was submitted in blank.

On April 2, 1930, and by reason of the decisions in the New York & Albany Lighterage Company case and other similar cases, among them the Estate of Fleitman, 23 B. T. A. 1418, then pending, and the enactment of Sections 506 and 607, Revenue Act 1928, it became material, as the Plaintiff's attorneys thought, to find out whether or not the above-named waiver form had ever become a consent in writing between the parties, signed by the Commissioner of Internal Revenue or anyone authorized by him.

On April 2nd, 1930, the Plaintiff's attorney, WILLIAM N. WOOD, addressed and forwarded to the Commissioner of Internal Revenue a letter asking him for copies of all waivers filed by the Plaintiff for the years 1917 and 1918.

On April 23, 1930, a photostat of the waiver form in question bearing the name of Robert Lucas showing on its face that it was signed and dated April 7, 1930, was sent to the attorney of the Plaintiff by the Deputy Commissioner of Internal Revenue. Accompanying said photostat was a bill for seventy-five cents by the Commissioner of Internal Revenue against the attorney for the Plaintiff as a charge for such photostats as were enclosed.

This bill the Plaintiff's attorney duly paid.

Copy of the letter to the Commissioner, his answer, the waiver and the bill from the Commissioner are attached hereto.

From the above it is clear that the information did not reach the Plaintiff through any mysterious channel but in the regular course of business.

At all times the Plaintiff's attorneys have attempted diligently to conduct themselves with such dignity, openness and honesty as the superior standing of this Honorable Court requires them to do, and have attempted always to demean themselves as members of the Bar of this Honorable Court should.

Plaintiff believes and therefore invites the Court's attention to the belief that the language of the Court in this case raises an inference of improper conduct on the part of the Plaintiff and/or its attorneys, and tends to create and promote the idea that the Plaintiff and/or its attorneys have not been conducting themselves as the rules of conduct of this Honorable Court require, or as the standards of their profession and mankind generally require them to do. Whereas, the true facts are that they have in this transaction fulfilled their duty to this Honorable Court and to their client, and have not committed any act which can in any way cast reflection upon them as attorneys or as members of this Bar.

The prayer of the Plaintiff is that the words be stricken from the record; that its rights may not be prejudiced.

The prayer of the attorneys is that these words be stricken from the record and some public mention made thereof in order that they may not be held up to ridicule and contempt by their fellow lawyers and fellow men.

The Plaintiff's attorneys state that on every hand since the decision they have been chided and criticized for the expression used by the Court; that at the time of attending a hearing before a Commissioner of the Court of Claims in Boston, Massachusetts, on March 22, 1933, persons associated with the Federal Government Tax Department in that matter chided the attorneys for the Plaintiff accusing

them of having been chastised by these words of this Honorable Court.

Attorneys for the Plaintiff value their standing in this Court and before the world as members of the Bar of this Court, and they beg this Court to correct the statement in order that their good name and reputation may not be damaged or destroyed.

Respectfully submitted,

WILLIAM N. WOOD,
Attorney for Plaintiff,
Woodward Building,
Washington, D. C.

Of Counsel:
HOWE P. COCHRAN,
FREDERICK S. WINSTON.

April 2, 1930.

Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

Please furnish me with copies of all waivers filed by the R. H. Stearns Company for the years ending July 31, 1917, and July 31, 1918.

Please furnish me with copy of certificate of over-assessment for the year ending July 31, 1918.

Yours very truly,

WNW:MI

WILLIAM N. WOOD.

TREASURY DEPARTMENT
Washington ,

Office Of
Commissioner of Internal
Revenue

Address Reply To
Commissioner of Internal
Revenue and Refer to
IT:R:F:G
BMV

APR. 23, 1930.

Mr. William N. Wood,
513 Woodward Building,
Washington, D. C.

Sir:

In accordance with the request contained in your letter dated April 2, 1930, there are enclosed photostat copies of waivers filed by R. H. Stearns Company, 140 Tremont Street, Boston, Massachusetts, for the fiscal years ending July 31, 1917, and July 31, 1918, and a copy of certificate of over-assessment for the fiscal year ending July 31, 1918.

Respectfully,

(Signed) DAVID BURNET,
Deputy Commissioner.

Enclosures.

(1036M)

TREASURY DEPARTMENT
BUREAU OF INTERNAL REVENUE
Income Tax Unit

RECEIVED
PAYMENT
APR. 24, 1930
Commissioner of
Internal Revenue.

.....19....	
....Copies Returns @ $1.00	$....
3 Copies Other Papers @ .25	0.75
....Certifications @ .50....	....
AMOUNT DUE	$0.75

Mr. William N. Wood,
513 Woodward Building,
Washington, D. C.

Returns of papers furnished

Copies of waivers filed by R. H. Stearns Co., for the years July 31, 1917, and July 31, 1918, and copy of certificate of over-assessment for the year July 31, 1918.

STAMPS NOT ACCEPTED

Make remittance payable to TREASURER OF THE UNITED STATES and forward to the Commissioner of Internal Revenue, Income Tax Unit, Washington, D. C., attention IT:R. Please return this statement with remittance and the copies of documents listed herein will be forwarded to you.

February 19, 1923.

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, R. H. STEARNS & COMPANY, of Boston, Massachusetts, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income, excess-profits, or war-profits taxes due in any return made by or on behalf of the said company for the fiscal years ending July 31, 1917, and July 31, 1918, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide Revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, irrespective of any period of limitations, provided that determination and assessment is made within two years from March 1, 1923, and provided further that such determination and assessment shall not be made except after deliberate, intensive and thorough consideration, and not on superficial determination of the true liability.

R. H. STEARNS & COMPANY,
Taxpayer.
By HENRY W. GEISE, *Treas.*

Attest:

(Signed) Wahlon K. Leighton
Clerk

(Signed) Robt. H. Lucas,
ABN Commissioner
April 7, 1930.

Affidavit.

HOWE P. COCHRAN, being first duly sworn, deposes and says:

That he is an attorney with offices at 920 Potomac Electric Power Co. Building, Washington, D. C.

That he was one of the attorneys for the petitioner in the case at bar.

That he is familiar with the entire history of the case and he knows of his own knowledge that the facts set out in the foregoing motion are true and that the letters appended thereto are true and exact copies of the originals which passed in due course of business between Mr. William N. Wood and the Treasury Department.

HOWE P. COCHRAN.

Subscribed and sworn to before me this 7th day of June, 1933.

[SEAL.] CHARLES LEO DE ORSEY,
Notary Public.

My commission expires on April 28th, 1935.

STATUTES INVOLVED

Revenue Act of 1921, Section 250 (d):

"The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: Provided, That in the case of income received during the lifetime of a decedent, all taxes due thereon shall be determined and assessed by the Commissioner within one year after written request therefor by the executor, administrator, or other fiduciary representing the estate of such decedent: Provided further, That in the case of a false or fraudulent return with intent to evade tax, or of a failure to file a required return, the amount of tax due may be determined, assessed, and collected, and a suit or proceeding for the collection of such amount may be begun, at any time after it becomes due: Provided further, That in cases coming within the scope of paragraph (9) of subdivision (a) of section 214, or of paragraph (8)

of subdivision (a) of section 234, or in cases of final settlement of losses and other deductions tentatively allowed by the Commissioner pending a determination of the exact amount deductible, the amount of tax or deficiency in tax due may be determined, assessed, and collected at any time; but prior to the assessment thereof the taxpayer shall be notified and given a period of not less than thirty days in which to file an appeal and be heard as hereinafter provided in this subdivision.

"If upon examination of a return made under the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or this Act, a tax or a deficiency in tax is discovered, the taxpayer shall be notified thereof and given a period of not less than thirty days after such notice is sent by registered mail in which to file an appeal and show cause or reason why the tax or deficiency should not be paid. Opportunity for hearing shall be granted and a final decision thereon shall be made as quickly as practicable. Any tax or deficiency in tax then determined to be due shall be assessed and paid, together with the penalty and interest, if any, applicable thereto, within ten days after notice and demand by the collector as hereinafter provided, and in such cases no claim in abatement of the amount so assessed shall be entertained: Provided, That in cases where the Commissioner believes that the collection of the amount due will be jeopardized by such delay he may make the assessment without giving such notice or awaiting the conclusion of such hearing."

Revenue Act of 1924, Section 278 (e):

"This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

Revenue Act of 1926, Section 1106 (a):

"The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

Revenue Act of 1928, Section 506:

"(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

'(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.'

'(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before

the expiration of the period previously agreed upon.'

"(b) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:

'(f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929.'

"(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed."

Revenue Act of 1928, Section 607:

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Revenue Act of 1928, Section 609 (a):

"Credit against barred deficiency.—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607."

RULINGS INVOLVED

Commissioner's Mimeograph 3085:

"Treasury Department,
Office of Commissioner of Internal Revenue,
Washington, D. C., April 11, 1923.

Unlimited waivers for 1917 income taxes held to expire April 1, 1924.

To collectors of internal revenue, internal revenue agents in charge, and others concerned:

The form of waiver now in use extends the time in which assessments of 1917 income and excess-profits taxes may be made to one year from the date of signing by the taxpayer. Inasmuch as there are many waivers on file signed by taxpayers containing no limitation as to the time in which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1, 1924.

D. H. Blair, Commissioner."

I. T. 1446:

Revenue Act of 1921.

"The income tax return of the M Company was filed February 27, 1917. Notice and demand for additional income taxes due for the year 1916 was mailed by the collector on March 1 and received on March 2, 1922.

"Second notice and demand for the tax was sent on March 10, 1922. The collector has notified the corporation that if the taxes are not paid, he will distrain its property.

"Under the provisions of section 250 of the Revenue Act of 1921, taxes for years prior to 1921 must be determined and assessed within five years after the return was filed, and no suit or proceeding for the collection of the tax may be begun after the expiration of such five years. It is contended that in this case neither of these requirements of the statute has been

met, and request is made that the collector be instructed to refrain from distraining the property.

"This office is of the opinion that the following provision of section 250 (d) of the Revenue Act of 1921:

> 'No suit or proceeding for the collection of any such taxes due under this Act or any prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed—'

refers only to judicial proceedings for the collection of such taxes and not to the summary proceeding by means of distraint authorized by sections 3187 to 3209 of the Revised Statutes of the United States.

"As the additional taxes in question were placed on the assessment list under date of February 24, 1922, it will be seen that such taxes were determined and assessed within the five-year period of limitation provided in section 250 (d) of the Revenue Act of 1921, and that the action of the collector in demanding payment after the expiration of such five years was entirely proper. If payment of the additional assessment of taxes was not made within the prescribed time, the collector may proceed by means of distraint to collect such taxes."